
THE
PROJECTS AND
CONSTRUCTION
REVIEW

FOURTH EDITION

EDITOR
JÚLIO CÉSAR BUENO

LAW BUSINESS RESEARCH

THE PROJECTS AND CONSTRUCTION REVIEW

The Projects and Construction Review

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THE
PROJECTS AND
CONSTRUCTION
REVIEW

Fourth Edition

Editor
JÚLIO CÉSAR BUENO

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EDITOR'S PREFACE

La meilleure façon d'être actuel, disait mon frère Daniel Villey, est de résister et de réagir contre les vices de son époque. Michel Villey, Critique de la pensée juridique moderne (Dalloz (Paris), 1976).

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association (ICP), the American College of Construction Lawyers (ACCL), the Society of Construction Law (SCL), the Dispute Resolution Board Foundation (DRBF) and the American Bar Association's Forum on the Construction Industry (ABA). All of these institutions and associations dedicated themselves to promoting an in-depth analysis of the most important issues related to projects and construction law practice and I thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are relatively young, highly specialised areas of legal practice. They are intrinsically functional and pragmatic and require the combination of a multitask group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table. That is why I am very happy to present you non-lawyers' chapters specifically prepared for the introductory part of this book: 'The Need for International Construction Measurement Standards' by Matthew Saunders and Alan Muse at the Royal Institution of Chartered Surveyors (RICS). Frank Giunta, Maurice Masucci and David Price, senior representatives from Hill International, offer us 'A Guide to Alternate Project Delivery Systems' and Alexander Aronsohn, Ben Elder and Marcia Ferrari, senior representatives from RICS demonstrate some innovative approaches to spatially enabling land administration and management.

These chapters provide further breadth to the variety already produced by Robert S Peckar (Peckar & Abramson), Douglas S Jones (Clayton Utz) and Phillip Fletcher (Milbank, Tweed, Hadley & McCloy LLP), three leading professionals and lecturers in the field of project finance and construction law. Despite living miles away from each other – in the heartlands of the United States (Bob), the United Kingdom (Phillip) and

Australia (Doug) – they have equally influenced the main players in project financing in dealing with the complex issues related to the development and implementation of projects, the negotiation of construction and engineering contracts and the challenges of crafting the perfect financing package.

I am also glad to say that we have contributions from two new jurisdictions in this year's edition: Indonesia and Turkey. Although there is an increased perception that project financing and construction law are global issues, the local flavour offered by leading experts in 31 countries has shown us that in order to understand the world we must first make sense of what happens locally; to further advance our understanding of the law, we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors and their law firms that graciously agreed to participate.

Finally, I dedicate this forth edition of *The Projects and Construction Review* to Dr Kris R Nielsen, PhD, JD, PMP, MRICS, MJSCE, and Dr Sérgio Alfredo Rosa da Silva, professor at the prestigious University of São Paulo Engineering School. Both passed away last year.

I had the honour of working with both of them and it was a remarkable and unique experience to learn how to deal with projects with a global and strategic perspective on risk management and best practices. They spent their career working towards bettering the construction industry and worked tirelessly to promote the areas of law and engineering with a view to their joint futures.¹

Dr Nielsen and Dr Rosa da Silva will be greatly missed.

I look forward to your comments and contributions for the forthcoming editions.

Júlio César Bueno

Pinheiro Neto Advogados

São Paulo

July 2014

1 Dr Nielsen co-edited and authored an important book entitled *Managing Gigaprojects – From Those That Have Been There Done That*, published by ASCE Press in October 2012, which is already considered a classic and a great reference for those working in the field. In the words of his beloved wife Dr Patricia Galloway: 'Dr Nielsen was a global leader in helping contractors and owners to define what makes a successful project. He helped them examine their operations and how to address subjects like risk management, execution, project controls, value engineering, corporate strategy, construction law, dispute resolution, project sustainability, etc. While on assignments, he worked with his clients to help select younger members of their organisation, i.e., to mentor in how to achieve project success. Dr Nielsen derived great satisfaction in knowing there was a growing cadre of people who were learning and then practising their new-found skills while striving for project success.' See www.pegasus-global.com/personnel/.

Chapter 32

TURKEY

*H Ercument Erdem*¹

I INTRODUCTION

Turkey, with major structural reforms and strategies in its economic policy in recent years, has shown remarkable performance. The main objective of its economic policy is to increase private investment and decrease state interference. This focus bore fruit in many areas, including the privatisation of roads, bridges, ports and the privatisation of the power sector. Moreover, a major transition area in Turkey is the health-care system, where health-care projects are being launched to be concluded as part of public-private partnerships (PPPs).

With these ambitious objectives regarding infrastructure and energy, the use of project finance transactions in infrastructure investments is increasing day by day. The funding for infrastructure projects comes from different entities, including multilateral agencies and Islamic banks. The multilateral agencies and development banks played a significant role in the financing of the Marmaray project, the railway tunnel under the Istanbul strait. The financing of the project was arranged by the Treasury of Turkey under the Ministry of Finance. Accordingly, a loan agreement between the Japan Bank for International Cooperation (JBIC) and the Republic of Turkey was signed. The loan was an ODA (Official Development Assistance) loan. Moreover, a principal loan agreement between the European Investment Bank (EIB) and the Republic of Turkey was also signed.

II THE YEAR IN REVIEW

Due to Turkey's emerging economy and the need to develop infrastructure, new infrastructure investments have been concluded in various industries. These industries

¹ H Ercument Erdem is a senior partner at Erdem & Erdem Law Office.

include transportation, health care, energy and construction. The government allocated US\$26 billion to the infrastructure sector in 2013. Some of the most interesting projects are described below.

i Marmaray project

One infrastructure project, commenced in 2013, was the Marmaray project, which was the construction of a railway tunnel under the Istanbul strait. As indicated above, multilateral agencies and development banks played a role in the financing of the Marmaray project.

ii Third bridge and North Marmara Highway

Third bridge and the North Marmara Highway, a project with a declared investment cost of 4.5 billion Turkish lira, is set to be the world's widest and longest combined road and rail bridge. The project is structured on a build-operate-transfer (BOT) model and its construction began in 2013, with completion expected in 2015. The construction and operation of the project are left to a consortium for 10 years, two months and 20 days, and will be transferred to the Ministry of Transport at the end of this period.

iii Nuclear power plants in Sinop and Mersin

In the energy sector, Turkey has recently completely privatised power distribution and is aiming to complete the privatisation of its power generation assets in a few years. Turkey aims to increase its installed power capacity, and thus, the energy sector requires significant infrastructure investment. Two of the biggest infrastructure projects with respect to energy are the construction of two nuclear power plants in Sinop and Mersin. These power plants require US\$40 billion in financing. However, the construction of these nuclear power plants has raised concern with respect to the environment from the public, and the relevant permits have not yet been obtained.

iv Health campus projects

Turkey enacted a new law regarding the construction and renovation of health-care facilities under the PPP model. Consequently, various health campus projects have been initiated. One of the projects in the construction phase, the Ankara Etlik Integrated Health Campus Project, is projected to be the largest integrated hospital campus in the world.

v Urban renewal projects

Law No. 6303 on the Transformation of Areas at Risk of Natural Disasters was published in the Official Gazette dated 31 May 2012. This law aims to restore and renovate buildings that are within the borders of earthquake risk or are prone to destruction during natural disasters. The buildings fulfilling such conditions are 6.5 million residences and restoration of some buildings has begun.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

In Turkey, ownership structures of project financing are consistent with international standards. Generally, for the construction phase joint ventures and consortiums are established. Typically, the infrastructure is operated by a project company. The legal form of the project company is usually a joint-stock company.

The BOT model is a financing method usually used in developing countries in order to carry out projects with high cost. To a large extent, infrastructure projects such as the construction of roads, bridges, dams, sewerage plants, highways, rail systems, airports and ports in Turkey are structured on a BOT basis. The BOT model is regulated by the Law on the Procurement of Certain Investments and Services within the Context of the Build-Operate-Transfer Model, which was published in 1994. The projects concluded through BOT have certain advantages, such as being exempt from stamp duty and certain other fees. Other than BOT, build-operate (BO) and build-lease-transfer (BLT) models are also used in Turkey.

ii Documentation

Turkish law does not have specific rules with regard to the documentation in project finance transactions. However, the documentation in large project finance transactions in Turkey is fairly similar to the documents used in international markets. Depending on the particular project, project documents shall mainly comprise project agreements, operation and management (O&M) agreements, term sheets, construction contracts (mostly engineering-procurement-construction (EPC) contracts), direct agreements and finance documents such as common terms agreements and facility agreements. Offtake sales contracts and power sales agreements are also used in the relevant projects.

In BOT projects, a governmental concession is required. However, there is no single standard concession agreement that is used in every transaction. With respect to PPP projects for health facilities, the agreement for the construction and procurement of certain services for said health facilities must include certain provisions in accordance with the Law on Construction and Renovation of Healthcare Facilities and Procurement of Services by the Ministry of Health under the Public Private Partnership Model and Amendment of Certain Law and Decrees No. 6428 (Law No. 6428).

iii Delivery methods and standard forms

In Turkey, some PPP transactions for the construction of health-care facilities have started to use EPC contracts whereby the contract provides for the work to be done by the contractor at a fixed price. Such contracts with a fixed price and turnkey transfer the risks to the contractor, who is responsible for the design and construction of the works for a lump sum.

Turkish domestic construction contracts are subject to the provisions of the Turkish Code of Obligations, the Turkish Civil Code and the related articles of the Public Procurement Law. However, for large construction projects including foreign parties, there is a need to set uniform rules for such construction contracts. Accordingly,

in Turkey, the most commonly used standard forms of contract for construction are from FIDIC (International Federation of Consulting Engineers).

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

The management of risks is a crucial issue in project finance transactions. There are different types of risks that may be encountered in a project finance transaction. Larger projects tend to identify all risks and allocate these risks beforehand.

Construction projects mostly include risks on delay in completion. In a limited-recourse project financing, different risks will be allocated to different parties and generally the project company will bear the risk of delay. However, the project company will transfer the risk of delay to the contractor through the construction contract.

In many project finance transactions, there is a risk of not obtaining the necessary permits and approvals since infrastructure projects require the obtaining of many permits and licences. Generally, these permits and licences are regulated as condition precedents for the drawdown.

Other risks that may be faced in project finance transactions include operation risks, environmental risks and insolvency risks. With respect to operation risks, these risks will mostly be transferred to the operation and management contractor.

ii Limitation of liability

The main purpose of an agreement of liability limitation is to limit compensation claims for damages incurred because of the negligent behaviour of the obligor. In contractual relationships, such compensation claims may be filed where the obligation has not been performed or has not been duly performed by the negligent obligor.

The general principles of the Turkish Code of Obligations, such as freedom of contract or the requirement of mutual consent, apply to such agreements as well. This also means that any agreement with terms that go against imperative rules of law, moral rules, personal rights and public order shall be invalid.

Besides, the Turkish Code of Obligations does not allow limitations of liability for gross negligence and wilful intent. This interdiction is stipulated as an imperative rule of law, thus, any agreement and clause in contradiction with this rule shall be invalid. The joint negligence of the creditor shall trigger a reduction in the amount of compensation.

Under Turkish law, as in many other legal systems, force majeure removes liability for the non-performance of the contract. However, parties can define in the contract which situations would constitute a force majeure. Also, it must be stated that Turkish law allows penalty clauses. However, compensation arising from a penalty clause cannot be obtained where it occurs as a consequence of a force majeure or other fact for which the obligor is not at fault or negligent.

iii Political risks

The Kurdish question

Turkey, experiencing certain unrest at times, has been a fairly politically stable country in recent years and a change in the government in the near future seems unlikely. The

Kurdish issue has been one of Turkey's most delicate and complicated political problems since the 1980s. However, there is a peace process under way involving a diverse cross-section of stakeholders from all regions in Turkey and a fairly stable atmosphere has been ensured.

Property rights

The right to own property is recognised under the Turkish Constitution and everyone has property rights pursuant to the Turkish Constitution. The only restriction on property rights is that they may not be exercised contrary to the public good.

Asset expropriation

Foreign investors in Turkey enjoy various rights and incentives like the Turkish citizens and even though Turkey is faced with excessive expropriation of assets by the government, these are mostly for the urban renewal projects or for the construction of power plants. Therefore, there is a very low risk that a large-scale project will be expropriated or nationalised since the Turkish government supports such projects and regards them as necessary for the development of the Turkish economy. Moreover, in case of expropriation compensation is granted. However, most of the unrest with regard to construction projects generally results from protests from non-governmental organisations and individuals who are against these projects. Still, as said earlier, the government stands behind such projects and therefore they are not considered to involve political risk.

V SECURITY AND COLLATERAL

In Turkish practice, funders secure themselves through a number of securities and impose substantial legal obligations on the project company/borrower. In addition, they frequently take co-guarantees from the guarantors.

i Mortgage

Generally, in transactions involving real estate, a mortgage over the real estate will be established. A mortgage may be established in order to secure a current or future receivable. Under the Turkish Civil Code, the general rule is that the possession of a certain amount must be demonstrated, in Turkish lira, in the land registry in order to establish a mortgage over an immoveable property. However, there is a substantial exception to this rule. The mortgage over an immoveable may be established in a foreign currency for loans provided in foreign currencies by the credit institutions. For the establishment of a mortgage, a mortgage agreement must be concluded between the owner of the immoveable and the lender. According to a provision of the Land Register Law, mortgage transactions facilitated by banks may be registered with the land registry without the issuance of an official contract through reference to the credit or loan agreements between the creditor and the debtor. Turkish law provides convenience with respect to the establishment of mortgages in order for the banks to secure their credits through the mortgage.

ii Share pledge

In the presence of a special purpose vehicle (SPV), the pledge of shares and all the related rights of the project company in favour of the lenders will be established. The rules with regard to the establishment of the share pledge (in joint-stock companies) are dependent on the share type. However, no registration requirement is foreseen for the share pledge. In addition, if the SPV is a limited liability company, the share pledge agreement must be notarised. The pledge may be registered with the company's share ledger where the shares are registered shares.

iii Commercial enterprise pledge

A pledge over moveable property and if applicable, commercial enterprise pledge, are two types of security generally requested by the funders. In a commercial enterprise pledge, the moveables are pledged entirely by a single pledge agreement without the delivery of their possession. The pledge agreement on commercial enterprises must be in statutory form notarised by the public notary in the registry district of the commercial enterprise.² This form is a requirement for the validity of the pledge. In addition, a list indicating all the elements within the scope of the pledge and their distinctive characteristics must be annexed to the pledge agreement. In addition, the registration of the pledge agreement is a validity requirement and has a constitutive effect for the pledge. Other securities include a pledge on the project bank accounts, assignment of the receivables and insurances.

iv Step-in rights

In Turkey, step-in rights are not regulated within a legal framework. However, in PPPs and privatisations, it is common to see step-in and substitution provisions allowing the lenders to appoint additional obligors or a permanent substitute for the borrower.

VI BONDS AND INSURANCE

i Bonds

Typically certain bonds are used in large project finance transactions and construction contracts. In construction contracts, performance bonds, securing the performance obligations of the contractors, are generally used. Bonds are guaranteed by a bank.

Bank guarantees are usually used as well. By means of bank guarantee, the guarantor bank undertakes to pay the beneficiary any amount up to the defined maximum upon its first demand. This guarantee may be exercised where certain obligations are not fulfilled.

There is also a new regulation regarding the treasury guarantee, which was recently published in April 2014. The Regulation on the Assumption of Debts by the Undersecretariat of Treasury enables a commitment on assumption of debts by the Undersecretariat of Treasury in BOT projects having a minimum investment amount of 1 billion Turkish lira and BLT projects conducted by the Ministry of Health and Ministry of Education having a minimum investment amount of 500 million Turkish

2 Law No. 1447 on Commercial Enterprise Pledges, Article 4.

lira. The commitment on assumption of debts shall be granted in a manner that shall include 85 per cent of the principal credit amount where the agreement is terminated due to the fault of the project company; whereas, it shall include 100 per cent of the principal credit amount due to termination of the agreement where the project company is not at fault. As per said regulation, the debt assumption agreement will not be published in the Official Gazette of Turkey, a provision highly criticised since it removes transparency.

Sukuk, Islamic leasing certificates, is another financing instrument that has come into use in Turkish markets recently. The government has recently passed a regulation on the issuance of leasing certificates. The Treasury and participation banks generally use sukuk as a financing instrument.

In Turkey, project bonds are not used often. However, for projects involving multinational parties, project bonds are emerging and are likely to be considered for future projects.

ii Insurance

Usually, PPP projects regarding the construction of health facilities require different types of insurance in the construction and operation phases. PPP projects include a construction insurance, which is generally 'all risk' insurance, covering the contract works executed, materials and temporary works, against all risk of physical loss or damage. Also, usually there is insurance to cover advance loss of profits due to delay. Operational insurance covers the assets of the project against all risks of physical loss or damage, including natural hazards and acts such as terrorism. Operational insurance usually covers medical malpractice as well.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

In Turkey, enforcement of security and bankruptcy proceedings are resolved in accordance with the rules set forth in the Execution and Bankruptcy Law (EBL). In many project finance transactions, the lenders secure themselves through mortgages and pledges over moveable property.

In case of a pledge, the creditor is obliged to foreclose the pledged property instead of conducting a general seizure. Moreover, if a mortgage has been granted as a security for a loan agreement, a specific enforcement method, entitled enforcement proceeding, through foreclosure of the mortgage will be applicable.

The lender may enforce the security through an official enforcement proceeding and the seized immovable may only be sold in a public auction. A provision in the security agreement stating that the pledged immovable shall become the property of the creditor if the debt is not paid is deemed to be invalid under Turkish law. Moreover, a court proceeding is the only available mechanism to seize the assets of the project company in an enforcement proceeding.

Pursuant to the EBL, the first receivables that will be paid are the pledged receivables and other receivables shall be paid only after the pledged receivables are satisfied. Still, if the pledge is enclosed by the bankruptcy estate, the real estate tax, customs, estate duty etc. arising from the pledged property shall be paid first from the

sale price. In addition, the expenses borne during the foreclosure shall be deducted from the sale price. The only items that will be paid before the payment to the lender are the taxes arising from the sale of such property and the expenses incurred due to such sale. Afterwards, the lender's receivable shall be paid together with the interest accrued until the date of sale. However, the amount paid in such manner shall be limited to the value of the pledge.

According to amendments made to the EBL, the general rule is that public receivables such as taxes are not privileged receivables. For instance, attorneys' fees regarding such immoveable property are considered as privileged receivables. Consequently, these privileges shall be paid primarily from the sale of the property, as with pledged receivables. Where this receivable, which shall be paid from the sale of the property, coincides with the right of mortgage, the priority shall be resolved by determining the receivable that has arisen before and accordingly, the receivable that has arisen before shall be paid first.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

Turkey has several laws and regulations regarding the protection of the environment and the licences and permits required with regard to the environment. The principle regulation on protection of environment is the Environmental Law. The licences and permits that have to be obtained pursuant to the Environmental Law are determined in a special regulation, entitled 'Regulation on the Licences and Permits that have to be procured in accordance with the Environmental Law'. According to the Regulation, enterprises that produce high levels of environmental contamination must obtain an environment permit or environment licence and permit. These enterprises are listed as an annex to the Regulation and include power plants, ports, hospitals (with over 20-bed capacity), hotels and integrated plants.

Because the vast majority of projects are construction projects, Turkey has recently adopted a new Environmental Impact Assessment Regulation (EIAR). Many large-scale projects will be subject to the provisions of the EIAR due to their potential harm to the environment. An EIA report will be prepared for projects listed in the Regulation and no permits, approvals or building use permits may be granted unless the EIA is passed or it is deemed that an EIA is not required.

The Regulation on the Application of Articles 17/3 and 18 of the Forest Law entered into force recently. This Regulation enables the construction of certain facilities, such as roads, airports, railroads, tunnels, hospitals and educational buildings, in the forest areas in the public interest. Consequently, possible construction projects enabling construction in the forest areas may be expected in the future.

ii Equator Principles

Turkish banks are not yet signatories to the Equator Principles. However, in Turkey most of the large project finance transactions involve multinational banks that are signatories and a number of projects refer to the Equator Principles.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

Turkey does not have a uniform PPP law and currently there are two laws regulating PPPs.

The first is the Law on Construction and Renovation of Healthcare Facilities and Procurement of Services by the Ministry of Health under the Public Private Partnership Model and the Amendment of Certain Laws and Decrees No. 6428 (Law No. 6428), which set forth the framework for the construction of health facilities.

With respect to the tender process, projects planned under Law No. 6428 shall not be subject to the State Tender Law No. 2886, nor to the Public Tender Law No. 4734. The tender authority is the highest-ranking administrator of the related unit of the central organisation of the Ministry of Health and its affiliate institutions.

The private investor shall provide a bid bond and a performance bond each equal to at least 3 per cent of the fixed investment amount (the total investment amount relating to the construction or renovation works and medical equipment requiring large financial resources as stated within the agreement) or the bid. During the operation period, the investor shall provide a bond in the amount of 1.5 per cent of the fixed investment amount or the bid. Moreover, the equity of the contractor allocated for construction cannot be less than 20 per cent of the periodic investment amount as determined in the project agreement.

Law No. 6428 was recently amended on 1 March 2014, due to the ever-changing structure of PPPs. A stay of execution was issued by an administrative court regarding tenders for health campuses opened in Ankara-Etlik, Ankara-Bilkent and Elazig. As a result, the amendments to Law No. 6428 changed certain important provisions and enabled retroactive amendments to the tender documents and agreements after the tender period in order to prevent the termination of the high-budget and long-term projects and to comply with the decision of the administrative courts.

The most significant and recent PPP transactions include Kayseri Integrated Health Campus, Ankara Etlik Integrated Health Campus and Ankara Bilkent Integrated Health Campus.

Another type of PPP regulation concerns the construction of education campuses and student dormitories. However, apart from the legal structure put in place, no project has yet been completed in this area. We should determine this regulation.

ii Public procurement

Turkey has a general public bidding law and this legislation ensures equal treatment, transparency, competition, confidentiality, public supervision, reliability and the efficient use of sources for tenders. After the tender procedure is concluded the agreements are drafted pursuant to the Public Tender Agreement Act No. 4735 (PTAA).

The complaints of applicants or wilful persons regarding the illegality of transactions or acts during the tender phase are reviewed by the relevant administration, and the Public Procurement Board reviews complaints about their decisions. However, these complaints do not suspend the tender procedure. If a transaction, which is the subject of a complaint, is found to be illegal, the tender will be cancelled. It should be

kept in mind that these remedies may be resorted to only before the relevant agreement is signed. For the parties to file a lawsuit, these administrative remedies must first be fulfilled and a stay of execution may only be rendered by the courts.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

Turkey's investment legislation complies with international standards, while it offers equal treatment for all investors. Foreign investment is regulated by the Foreign Direct Investments Law No. 4875 (FDIL), which aims to encourage foreign investment, to protect the rights of investors, to align investors and investments with international standards and to increase the volume of foreign direct investment through international treaties and various laws.

In accordance with the FDIL, the Undersecretariat of Treasury is entitled to determine the framework for direct foreign investment by taking into account the development plan and annual targets, the general economic situation of the country and the investment tendencies in the world. The Undersecretariat receives statistical information on the investments of foreign investors, but can use them only for statistical purposes. Therefore, there is a notification-based system with respect to foreign investments.

Another substantial issue in this respect is work permits for foreigners. The employment of foreign personnel is possible through a work permit obtained from the Ministry of Labour and Social Security. Certain developments have been made to ease the process, including an online application and limiting the relevant authorities with a specific period of time within which to give their decisions are set forth in the relevant regulations.

With the amendment to the Land Register Law in 2012, the reciprocity principle in the acquisition of immovable property has been removed. Foreign legal entities established pursuant to the laws of their country may own immovable property within the framework of their special laws and subject to certain restrictions. The Council of Ministers may impose certain restrictions where it is in the country's best interests.

Turkey introduced its Investment Incentive Programme in April 2012 and determined certain incentives in line with this programme afterwards. The new investment programme is an investor-friendly programme, aiming to boost investment support. A foreign company having its registered office abroad may file an application in order to benefit from the incentives, through opening a branch in Turkey, or through establishing a limited liability or joint-stock company in Turkey. The new incentive tools generally comprise customs duty and VAT exemption, social security premium support and free land allocation.

i Removal of profits and investment

In accordance with the rules in Turkey, foreign investors are subject to equal treatment with local investors. Pursuant to the FDIL, the net profit, dividend, sale, liquidation and compensation amounts, the amount to be paid in return for licensing, management and similar agreements, as well as external loan principal and interest payments may be freely

transferred abroad. Therefore there are no controls that restrict removal of profits from Turkey.

XI DISPUTE RESOLUTION

i Special jurisdiction

There are no specific courts or tribunals in Turkey when dealing with project finance transactions or construction contracts. Unless an alternative dispute resolution method is agreed by the parties, the jurisdiction of Turkish national courts is determined pursuant to the Code on International Private and Procedure Law No. 5718.

Pursuant to the Code, the jurisdiction of national courts when dealing with a dispute arising from a contractual relationship that fulfils the criterion of having a 'foreign element', is determined based upon the venue and competence rules applied in internal law to such disputes. Therefore, in such cases, the Code of Civil Procedure No. 6100 shall apply. Turkish national courts shall also have jurisdiction if there is a prorogation agreement between the parties.

ii Arbitration and ADR

Arbitration is the most widely used method of alternative dispute resolution when dealing with disputes from project finance transactions or construction contracts.

The Ministry of Justice has proposed a draft law that would aim to render Istanbul as an efficient centre of international arbitration. In the legal justification of said law, it is emphasised that the Istanbul Arbitration Centre is mostly influenced by the German Institution of Arbitration (DIS) and the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic.

Turkey ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) in 1991; thus, it is common to include arbitration clauses in contracts having an international nature. However, arbitral awards shall not be rendered on a non-arbitrable dispute pursuant to Turkish law or on a dispute that is against Turkish public policy; otherwise, they may not be recognised and enforced. In Turkish law, a non-arbitrable dispute refers to disputes arising from the subjects that are not dependent on the parties' own will, such as disputes related to family matters or matters or transfer of ownership rights on immovable properties. The decision of recognition and execution rendered by a national court for an arbitral award shall provide for the same legal effect as a national court decision on the dispute.

Turkey is also party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID) and to the Energy Charter Treaty. Turkey has signed bilateral investment treaties with 82 countries so far.

Turkey has also adopted a new law to render mediation a more efficient method of alternative dispute resolution. This law does not only concern domestic issues, but also aims to handle disputes having an international scope.

XII OUTLOOK AND CONCLUSIONS

Turkey has adopted an investment-friendly approach in recent years and it is realising its ambitious agenda related to investments in infrastructure and construction. Accordingly, project finance transactions are increasing day by day in Turkey. Infrastructure and construction projects will remain important in the Turkish economy in future years, in line with Turkey's objective to become one of the strongest economies in the world.

It seems that urban renewal projects, PPP projects in the health sector and projects with regard to power generation will continue to attract more investors each year. Turkey has achieved a fairly stable economic development, providing opportunities to investors through its new investment incentives and treasury bonds. Many positive changes are occurring in the infrastructure sector and the economy is developing at a rapid pace, despite the challenges and identified risks.

Appendix 1

ABOUT THE AUTHORS

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H Ercument Erdem is the senior partner of Erdem & Erdem Law Firm. He specialises in international commercial law, mergers and acquisitions, privatisations, corporate finance and arbitration. He is involved in many cross-border projects concerning project finance, privatisation or mergers and acquisitions. He participated in several arbitration proceedings as president arbitrator, sole arbitrator, party arbitrator and represented local and international clients in arbitration. He is also emeritus professor of commercial law at Galatasaray University Law School and he teaches law of negotiable instruments, corporate law, competition law and international commercial law. He is the vice-chair of the ICC CLP Commission and a member of the ICC Institute Council.

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